

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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GENERAL COUNSEL
OF COPYRIGHT

IOMEDIA PARTNERS, INC., et al.,

Appellants,

v.

UNITED STATES COPYRIGHT OFFICE,
LIBRARY OF CONGRESS,

Appellee.

No. 02-1244 (Consolidated with Nos.
02-1245, 02-1246, 02-1247, 02-1248,
and 02-1249)

**REPLY TO OPPOSITION OF THE RESPONDENT, THE LIBRARIAN OF CONGRESS,
TO MOTIONS TO INTERVENE FILED BY NON-PARTIES**

Pursuant to Fed. R. App. P. 27(a)(4) and Fed. R. App. P. 15(d), Appellants ioMedia Partners, Inc., Beethoven.com LLC, Chatmaster Streaming Network, ClassicalMusicDetroit.com, Digitally Imported Radio, Flaresound, iM Networks, Inetprogramming Incorporated, Internet Radio Hawaii, Internet Radio, Inc., Live365.com, Inc., Pacific Internet Broadcast Services, Radio Paradise, SomaFM, LLC, Ultimate-80s, Virgin Audio Holdings, LLC, Wherever Radio, WolfFM, and 3WK, Inc. ("ioMedia Petitioners") hereby reply to the Opposition of the Respondent, the Librarian of Congress ("Librarian"), to the Motions to Intervene Filed by Non-Parties ("Opposition"). As demonstrated below, the Opposition is without merit as the ioMedia Petitioners clearly satisfy the statutory standard for intervention in this case.

Nowhere in his voluminous Opposition can the Librarian deny that the ioMedia Petitioners satisfy the standard of Fed. R. App. P. 15(d) for appeal and intervention. It is undisputed that all the ioMedia Petitioners, as webcasters that have made transmissions pursuant

to the compulsory license granted by 17 U.S.C. § 112(e) and 17 U.S.C. § 114, are entities bound by the Librarian's determination. Because they are bound by the Librarian's determination, the ioMedia Petitioners surely have the right to intervene in cases involving that determination. As demonstrated in this Court's recent decision in Alabama Municipal Distributors Group v. FERC, section 802(g)'s silence on intervention requires that the ioMedia Petitioners need only satisfy the requirements of Fed. R. App. P. 15(d), which are minimal.¹ See Alabama Mun. Distrib. Group v. FERC, No. 01-1299, slip op. at 2 (D.C. Cir. Aug. 30, 2002).

FED. R. APP. P. 15(d).

The Librarian argues that intervention by the petitioners would be inconsistent with the statutory scheme but fails to point to any statutory language that would demonstrate inconsistency. The Librarian's reliance on Process Gas Consumers Group v. FERC, 912 F.2d 511 (D.C. Cir. 1990), is misplaced. Opposition at 5-6. In Process Gas, this Court declined to allow an intervenor to substitute itself for a petitioner after the petitioner who brought the original petition moved for voluntary dismissal. Process Gas, 912 F.2d 511; see also Alabama Mun. Distrib. Group v. FERC, No. 01-1299 (D.C. Cir. 2002) (distinguishing Process Gas for the same reasons). The issue as framed by the Court was whether an intervenor may continue a suit after the original petitioner withdraws. Id. at 513. In the instant case, the ioMedia Petitioners are not seeking to substitute themselves or continue a suit after the original petitioner withdraws. Indeed, no party has withdrawn from these appellate proceedings.

¹ Rule 15(d) states:

Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

The Opposition relies upon several cases that stand for the proposition that issues not raised below are not within the scope of review. Opposition at 6-7 (citing Platte River Whooping Crane Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992); Washington Util and Transp. Comm'n, 26 F.3d 935 (D.C. Cir. 1994). Again, these cases are wholly inapplicable. See also Alabama Mun. Distrib. Group v. FERC, No. 01-1299 (D.C. Cir. 2002) (holding reliance on Platte River "unavailing"). The ioMedia Petitioners are cognizant of what it is to be an intervenor in a proceeding.

Finally, the Librarian suggests that if intervention were permitted, the case would grow so unwieldy as to overwhelm the Court and parties. Opposition at 19. To demonstrate the degree of complexity of the case, the Librarian points to the high number of counsel (six) already involved in the case. Id. For better or for worse, six groups of counsel is hardly unusual. Evidence of this can be found in some of the very cases cited by Respondents. See, e.g., Process Gas, 912 F.2d. at 511 (twenty-one sets of counsel entering appearances or submitting briefs).

DATED: October 3, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2002, the foregoing ioMedia Petitioners' Reply to Opposition of the Respondent, the Librarian of Congress, to Motion to Intervene Filed by Non-Parties was served by U.S. mail, postage prepaid, on the following:

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